

**ORIGINAL**

No. 90-5774

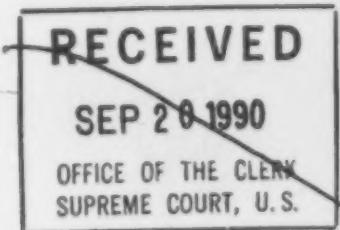
IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

ANDREW EDWARD ROBERTSON, Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF CALIFORNIA



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QUESTIONS PRESENTED

I.

Is the constitutional right to an impartial judge violated, in a death sentencing trial, when the trial judge previously served as the lawyer for the defendant's mother in an acrimonious divorce proceeding involving allegations of child abuse, neglect, and other subject matter relevant to the sentencing determination, and the judge fails to disclose the prior representation?

II.

At a death sentencing trial, does the failure of the trial court to disclose his previous representation of defendant's mother, a witness at the trial, in a divorce proceeding involving subject matter relevant to the sentencing determination, render defendant's waiver of his right to a jury trial, and submission to the judge as the sole fact-finder, constitutionally invalid?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Andrew Edward Robertson, and respondent, the People of the State of California.

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ANDREW EDWARD ROBERTSON, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

Petitioner Andrew Edward Robertson respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California, entered on June 21, 1990.

#### JUDGMENT BELOW

The order of the California Supreme Court in In re Robertson, No. S013698, denying petitioner's request for relief, is included as Appendix A to this Petition.

#### JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

The order below was entered on June 21, 1990.

#### CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5:

"No person shall . . . be deprived of life, liberty or property without due process of law;"

United States Constitution, Amendment 6:

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

United States Constitution, Amendment 8:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment 14, Section 1:

". . . nor shall any state deprive a person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

#### STATEMENT OF THE CASE

Petitioner requests that this Court review the judgment in In re Robertson, No. S013698, upholding the sentence of death entered after petitioner Andrew Edward Robertson's second penalty trial.

In 1978, Mr. Robertson was convicted by a jury of two counts of murder. In addition, nine special circumstances were found to be true, rendering Mr. Robertson eligible for the death sentence under California law. Cal. Pen. Code, § 190.2 (1977). The jury fixed the penalty at death. In 1982, the California Supreme Court affirmed the convictions but vacated petitioner's death

sentence due to prejudicial penalty phase error. People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279 (1982).

After a purported jury waiver, Mr. Robertson's second penalty trial was held before Judge Roy E. Chapman. On February 3, 1984, the trial court fixed the penalty at death and entered judgment accordingly. The Supreme Court of California affirmed Mr. Robertson's death sentence, People v. Robertson, 48 Cal. 3d 18, 767, P.2d 1109 (1989), and Mr. Robertson's Petition for Writ of Certiorari from that judgment was denied, Robertson v. California, No. 88-7619, 110 S. Ct. 216, 107 L. Ed. 2d 169 (1989).

Petitioner then initiated a proceeding for writ of habeas corpus in state court, No. S013698, challenging his convictions and sentence. The California Supreme Court denied the request for a writ of habeas corpus in an unpublished order on June 21, 1990.<sup>1</sup>

#### STATEMENT OF FACTS

The prosecution below arose out of the deaths of two women, Karen Ann Litzau and Kimberly Gloe, in the fall of 1977.

Petitioner was arrested at his apartment by San Bernardino

<sup>1</sup> Having exhausted his state avenues as to the claims brought in the state habeas petition and the previous appeals, petitioner filed a federal Petition for Writ of Habeas Corpus on September 10, 1990. There has been no previous federal habeas petition in this case. The execution of the capital sentence was stayed by the United States District Court for the Central District of California pursuant to that federal habeas proceeding and, consequently, no application for stay is submitted to this Court.

and Riverside County police officers on November 3, 1977 at 1:30 a.m. Petitioner was cooperative, and, following his arrest and Miranda warnings, participated in a taped interview.

In the taped interview, petitioner conceded his involvement in the Litzau and Gloe homicides. At all stages of trial, appeal and state post-conviction proceedings, the defense disputed the degree of petitioner's culpability, given his mental and emotional disabilities.

At the penalty retrial, the case was assigned to Judge Roy E. Chapman. Although petitioner was entitled to a jury trial on the question of penalty under California law, Cal. Pen. Code § 190.4 (1977), Judge Chapman presided alone, as the sole fact-finder, and sentenced petitioner to death.

This death sentencing proceeding was not, however, the first contact Judge Chapman had had with the Robertson clan. From 1963 to 1967, Roy Chapman, a practicing attorney in San Bernardino, represented Lillian Robertson Spencer, petitioner's mother, in an acrimonious divorce proceeding initiated by petitioner's step-father, Herbert Spencer. The divorce proceedings, which included allegations of child abuse and a custody battle over petitioner's half-brother, involved factual matters relevant to the penalty determination since mitigation evidence was introduced regarding petitioner's abused childhood. Judge Chapman's former client, Lillian Spencer, testified at the sentencing trial.

The record is bereft of any advisement of this prior representation or explanation of the potential conflict of

interest. Upon learning of Judge Chapman's previous involvement with petitioner's family, petitioner's counsel promptly brought a state habeas petition challenging the death sentence, and requesting a hearing. Without substantive comment, the California Supreme Court denied the petition.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In the state habeas proceeding, petitioner asserted, among other claims, that the death sentence violated the Fifth, Sixth, Eighth and Fourteenth Amendments because of the undisclosed previous involvement of Judge Chapman with petitioner's mother. This prior representation created the appearance of impropriety, a conflict of interest, exposed the judge to extrajudicial facts and rendered the jury waiver uninformed and invalid.

A majority of the California Supreme Court denied the claims summarily, with one Justice voting to issue an order to show cause. See Appendix A.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S DEATH SENTENCE IS INVALID BECAUSE THE TRIAL JUDGE FAILED TO RECUSE HIMSELF BASED ON HIS PERSONAL KNOWLEDGE OF DISPUTED FACTS AND CONFLICT OF INTEREST, OR TO ADVISE PETITIONER THAT HE HAD PREVIOUSLY REPRESENTED PETITIONER'S MOTHER IN DIVORCE PROCEEDINGS.

Judge Chapman, sitting as the sole trier of fact at petitioner's sentencing retrial, heard the evidence, assessed the credibility of the witnesses, and condemned petitioner to death. Yet, Judge Chapman had previously been exposed to extrajudicial information regarding petitioner's family and background through his representation, as a lawyer, of petitioner's mother. This exposure to extrajudicial fact was never disclosed to petitioner by the judge, nor is there any advisement or waiver on this record. At the time petitioner waived his fundamental right to trial by jury, he did not know that Judge Chapman had previous knowledge of his family background, nor did he know that the judge would be assessing the credibility of a former client, petitioner's mother, when she testified.

The facts underlying this situation are unique. In 1963, when petitioner was eighteen years old, his step-father initiated divorce proceedings against petitioner's mother. The complaint sought dissolution of the marriage and custody over Irving Spencer, petitioner's younger half-brother. Herbert Spencer's Complaint alleged "extreme cruelty" and "grievous mental suffering" among the reasons for the action. The Answer and

Cross-Complaint, filed on behalf of Lillian Robertson Spencer, was signed by attorney Roy E. Chapman of San Bernardino. The Cross-Complaint alleged "extreme cruelty" and the infliction of "grievous mental suffering" on the part of Herbert Spencer and, in addition, the infliction of "grievous bodily injury." In addition to these pleadings, Mr. Chapman filed a declaration supporting an order to show cause requesting a restraining order on the grounds that: "At various times . . . plaintiff has struck and beat defendant, the minor child of the parties hereto, and defendant's children by a prior marriage,<sup>2</sup> inflicting grievous bodily injury upon defendant and defendant's children, said beatings having been inflicted without bodily injury upon defendant and defendant's children, said beatings having been inflicted without justification . . ." Judgment in the divorce proceeding was entered on January 2, 1964.<sup>3</sup> Attorney Chapman submitted a Substitution of Attorneys and withdrew from the case on November 16, 1967.

Roy E. Chapman was subsequently appointed to the San Bernardino Superior Court, and the 1983 penalty trial of petitioner was assigned to him. On September 28, 1983, a hearing was set regarding possible jury waiver. The pretrial record is completely devoid of any discussion or advisement of Judge

<sup>2</sup> This reference is to petitioner and his sister, Linda Robertson Fingerle.

<sup>3</sup> A copy of the Cross-Complaint and the request for the restraining order were submitted to the court below and are included as Appendix B to this Petition.

Chapman's prior representation of Mr. Robertson's mother. On October 6, a purported jury waiver was taken, involving an oral colloquy in which Judge Chapman advised petitioner of some of his rights. RT, Vol. A, 4-8. Again, there was no advisement of the prior representation.

Trial commenced in late November, and petitioner's mother testified on December 7. At final argument, the deputy district attorney downplayed the suggestions of a difficult childhood, noting that petitioner had normal "socializing factors" and his background demonstrated his "willingness to appease." RT 1140, 1145-1146. The defense argued petitioner's harsh childhood and difficulties in early development as mitigation. RT 1150-1152, 1176. Then, Judge Chapman, acting as sole determiner of the credibility of witnesses and the facts underlying aggravation and mitigation, sentenced petitioner to death.

Whether a defendant is on trial for his life or a minor offense, the Fourteenth Amendment guarantees trial "before a disinterested and impartial judicial officer." Ward v. Monroeville, 409 U.S. 57, 58 (1972); see Johnson v. Mississippi, 403 U.S. 212, 216 (1971); Tumey v. Ohio, 273 U.S. 510 (1927). The requirement of an impartial, untainted judicial officer is vitally important in a proceeding, such as a capital sentencing process, involving the difficult assessment of a "myriad of factors." California v. Ramos, 463 U.S. 992, 1008 (1983); see California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., conc.).

As this Court has noted often, the death penalty is qualitatively different from any other sentence. California v. Ramos, 463 U.S. 992, 998-999 (1983); Zant v. Stephens, 462 U.S. 862, 884 (1983). Consequently, a "greater degree of scrutiny" must be employed when evaluating a death sentence (Ramos, 463 U.S. at 999) and "any decision to impose the death sentence must 'be and appear to be, based on reason rather than caprice or emotion.'" Booth v. Maryland, 482 U.S. 496, 508, quoting Gardner v. Florida, 430 U.S. 349, 358 (1977) (Stevens, J., plur.).

The judge's undisclosed involvement with the Robertson family and the necessary extrajudicial exposure to the circumstances of petitioner's background tainted the assessment of penalty and undercut the fundamental reliability of the capital sentencing proceeding. The prior representation may have influenced the judge in a number of ways. Judge Chapman may have formed opinions in the course of the representation about his client, about the character of petitioner, about the truth of certain allegations of child abuse. The trial court could have relied, consciously or unconsciously, on prejudicial extrajudicial information in making his decisions, especially since the factual matters before the judge at trial (such as the extent of the abuse and neglect suffered by petitioner) were closely tied to the subject of the former representation.

As trier of fact, the judge was called on to decide the truth of the facts presented, which necessarily involved an assessment of the credibility of witnesses, including his former

client; he was then required to assign weight to all the factors before him, a necessarily subjective process. See California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., conc.). Because of the complexity of the decision, any extrajudicial knowledge regarding the defendant's family history and any opinions regarding credibility, character, and the like, would be difficult, if not impossible, to separate from the presented evidence and ignore, despite the best intentions of the court. At each stage of the deliberative process, there was the potential, under these facts, for the injection of arbitrary, illegitimate, unreviewable factors which render the ultimate decision unreliable. See Gardner v. Florida, *supra*, 430 U.S. at 360-362. The only solution to the dilemma at trial was for the judge to withdraw; the only solution now is to reverse the sentence.

In assessing the need for strict recusal standards under federal statute, this Court has stressed that actual bias is not necessary. Rather, the appearance of impartiality is the requirement and, consequently, recusal is warranted whenever a judge's impartiality would be questioned by a reasonable person. Liljeberg v. Health Services Corporation, 486 U.S. 847, 860-861 (1988); see In re Faulkner, 856 F.2d 716, 721 (5th Cir. 1988). While Liljeberg assessed the statutory standard under 28 U.S.C. § 455, which contains language virtually identical to the

California standard,<sup>4</sup> the unique circumstances of a capital sentencing trial require the same untainted process, the same freedom from any appearance of impropriety. The Eighth Amendment requires identifiable reliability in capital sentencing, and a death verdict must "be, and appear to be," based on objective and rational grounds. Gardner v. Florida, supra, 430 U.S. at 358 (emphasis supplied); see also DelVecchio v. Illinois, 108 L. Ed. 2d 779 (1990) (Marshall, J., dissenting from den. of cert.).

In Gardner, supra, the Florida trial court reviewed a confidential presentence report in passing a sentence of death. The substance of that report was not disclosed, counsel did not have an opportunity to test the accuracy of the information, and this Court reversed the death sentence because it was based in part upon information that the defendant had no opportunity to refute. The situation here is no different. The judge was exposed to extrajudicial facts relevant to the sentencing determination and undisclosed to the petitioner. The failure of the judge to disqualify himself was fundamental error, depriving petitioner of "the appearance of evenhanded justice which is at the core of due process." Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., conc.). This Court should grant certiorari and reverse.

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<sup>4</sup> See Canon 3 of the California Code of Judicial Conduct; California Code of Civil Procedure §170 (1983).

## II.

BECAUSE THE TRIAL JUDGE NEVER REVEALED HIS PREVIOUS REPRESENTATION OF PETITIONER'S MOTHER AND NEVER DISCLOSED HIS EXPOSURE TO EXTRAJUDICIAL INFORMATION OF PETITIONER'S FAMILY, THE PURPORTED JURY WAIVER IS INVALID.

The waiver of a fundamental constitutional right must be express, voluntary, and intelligent, with knowledge of the nature of the right given up. Johnson v. Zerbst, 304 U.S. 458, 464 (1983); Michigan v. Jackson, 475 U.S. 625, 633 (1986). "Anything less is not waiver." Carney v. Cochran, 369 U.S. 506, 516 (1961).<sup>5</sup>

Prior to waiving his jury rights, petitioner was not informed of Judge Chapman's involvement with his family, extrajudicial knowledge, and duty to his mother stemming from the prior representation. A rational assessment of the pros and cons of proceeding before Judge Chapman, as opposed to a jury of twelve, cannot possibly be made absent this knowledge. See Boykin v. Alabama, 395 U.S. 238 (1969); Barksdale v. Emerick, 853 F.2d 1359, 1361-1362 (6th Cir. 1988). Consequently, the jury

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<sup>5</sup> Petitioner recognizes that this Court has held that a jury trial is not constitutionally guaranteed at a death sentencing trial. Spanziano v. Florida, 468 U.S. 447, 459-460 (1984). However, the state statute guarantees jury trial in this context and federal due process prohibits the arbitrary denial of a state jury entitlement. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). Whether petitioner's jury right stems from the Sixth or Fourteenth Amendments, it remains a fundamental right subject to the strict waiver analysis.

JUN 21 1990

Robert Wandruff Clerk

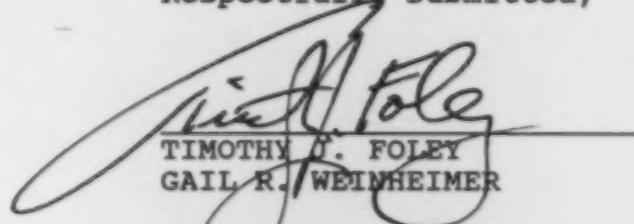
waiver was neither knowing nor intelligent.<sup>6</sup>

CONCLUSION

For the above discussed reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of California.

Dated: September 17, 1990

Respectfully Submitted,



TIMOTHY J. FOLEY  
GAIL R. WEINHEIMER

Counsel for Petitioner  
ANDREW EDWARD ROBERTSON

<sup>6</sup> As discussed in the previous certiorari proceeding, No. 88-7619, see 110 S. Ct. 216 (Marshall, J., dissenting from den. of cert.), the colloquy underlying the purported jury waiver in this case is invalid because the judge never informed Mr. Robertson that, if the jury was unable to decide upon penalty, the sentence would be life without parole. See 110 S. Ct. at 216-217; compare Harris v. State, 455 A.2d 979, 984 (1983) with People v. Robertson, 48 Cal. 3d 18, 38 (1989). Because the newly discovered information concerning Judge Chapman's involvement with petitioner's family compounds the invalidity of the jury waiver in this case, petitioner has taken the unusual step of requesting that this Court reexamine the jury waiver issue presented in the first petition for writ of certiorari. Filed with this petition is a Petition for Rehearing and a Motion for Leave to File Out-of-Time Successive Petition for Rehearing in No. 88-7619.

## ORDER DENYING WRIT OF HABEAS CORPUS

Criminal No. S013698

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DE

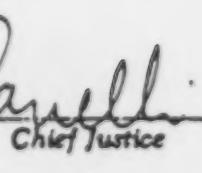
## IN BANK

In re ANDREW EDWARD ROBERTSON

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

Mosk, J. is of the opinion an order to show cause should issue.

  
Chief Justice